IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 651 OF 2000

Amit. Tyagi ..Appellant

versus

Tapisahankar Gulabchand

Trivedi ..Respondent

Mr. P. R. Dani for the Appellant.

Mr. C. R. Dalvi h/f. K. A. Bhatt for the Respondent.

CORAM : D. G. DESHPANDE,J.

DATE : 22ND MARCH,2005

ORAL ORDER :

1. Heard Mr. Dani for the appellant - original defendant and Mr. Dalvi for the respondent - original plaintiff.

2. Plaintiff was the tenant of the suit premises. He entered into an agreement with the defendant for conducting the business. The date of the agreement is 9.5.1997. The agreement is Exhibit 'A'. It was for a period of one year i.e. from 9.5.1997 to 8.4.1998. The Defendant paid Rs.1,50,000/- as a security deposit for proper

performance of the agreement. However, soon after entering into this agreement the defendant gave notice to the plaintiff dated 16.6.1997 as per Exhibit 'B'. In that notice the defendant repeatedly and in number of paragraphs alleged that the plaintiff made certain representations to him before and at the time of the agreement Exhibit 'A', and then ultimately the defendant has stated that all those representations made by the plaintiff were false and misleading, and, therefore the defendant demanded back the security deposit of Rs.1,50,000/- and also claimed Rs.2,25,000/- towards expenses incurred and loss suffered. The plaintiff was also warned of legal consequences if he did not concede to the demands made.

3. The plaintiff immediately gave reply to this notice treating as recession of the agreement by the defendant himself and also showed his willingness to return the amount after the accounts are settled. The plaintiff denied to have made any false representation before or during the agreement Exhibit 'A'.

4. The contention of the defendant was that the suit was actually for possession and valuation of the plaintiff was not proper, and, secondly it was the contention that the defendant was as per the

terms of the agreement (Exhibit 'A') was licensee coupled with possession of the property and therefore it was only the Small Causes Court which had jurisdiction over the matter. The defendant also contended that even after the so-called recession or notice (Exhibit 'B') and its acceptance by the plaintiff, there was a meeting between the plaintiff and the defendant wherein both the parties agreed to go by agreement Exhibit 'A'. Therefore, in short the suit of the plaintiff was liable to be dismissed.

5. The trial court recorded evidence where the plaintiff did not examine himself but the defendant examined himself, and after discussing the facts and circumstances the Court decreed the suit of the plaintiff, hence this appeal.

6. The crucial question is whether notice Exhibit 'B' is a notice terminating the agreement, Exhibit 'A', I have already noted that regarding this notice the defendant's contention was that the demand of the deposit was merely to pressurise the plaintiff to abide by the terms and conditions of Exhibit 'A' as there was no intention on the part of the defendant to terminate the agreement. In view of this peculiar defence, it is necessary to refer to the notice Exhibit 'B'. Main thrust of the

notice Exhibit 'B' is that the plaintiff made false and misleading representations and thereby induced the defendant to enter into this agreement. The word 'induced' is not used by the defendant in the said notice but from the averments in the notice it is clear that the defendant wants to contend that he was induced to enter into this agreement on the basis of certain false and misleading representations. These representations according to the defendant are :

1. That the shop is located in a prime locality and the eating house business shall be very profitable;

2. That the plaintiff has valid eating house licence of Grade II issued by the B.M.C., but it was not true.

3. Representation and agreement to remove vendors from the opposite side of the shop, but nothing is done in that regard.

4. Representation that basic amenities in the building are for use of all, but it is not so.

5. Representation that open space

behind the premises belongs to the plaintiff and it could be used for extending the kitchen, but the defendants found that the open space belonged to the temple.

6. Representation and plaintiffs' agreeing to render help to the defendant in starting business, but no efforts.

7. Representation that Potmala in the said shop is approved and authorised by B.M.C., but it was not so, and the BMC Authorities were harassing the defendant.

It will be therefore clear from this notice Exhibit 'B' that the defendant had given strong reasons for repudiating the agreement. Thus the case made by him in this notice Exhibit 'B' that he entered into agreement because of the inducement and false and misleading promises and representations by the plaintiff. In other words according to the defendant he was cheated by the plaintiff to enter into an agreement and now since he had realised that he was so cheated and he has realised that all the representations made by the plaintiff, as stated above, were false, he was demanding back this amount of security deposit. But this demand of security deposit is preceded by the termination of the agreement by the defendant because the defendant has

stated as under:

> **"My client states that under the above circumstances, he is unable to bear any more loss and hence he is desirous of terminating the agreement."**

7. It will be therefore clear that within a month or so of the execution of agreement, Exhibit 'A' the defendant realised that he was cheated by the plaintiff by making number of false and misleading representations. He also realised that he was cheated by the plaintiff by making number of false and misleading representations. He also realised that he was induced by the plaintiff to enter into an agreement by painting rosy picture of the business in future. Therefore, in this background before starting any business in the premises, he terminated the agreement in clear unequivocal terms and demanded the security deposit. In the notice Exhibit 'B' the defendant has never contended that he was a licensee. This notice Exhibit 'B' therefore cannot be construed in any other manner, than the intention of the defendant to terminate the agreement because of cheating and fraud practised by the plaintiff, and the demand of security deposit, is a natural consequence thereof.

8. The plaintiff rightly jumped upon the opportunity made available to him by the defendant by issuance of this notice Exhibit 'B' which was in the form of a proposal of termination so far as plaintiff is concerned and he accepted the proposal by his reply notice and called upon the defendant to hand over the premises and the shop business. Therefore if subsequent to the reply of the plaintiff the defendant indulges in correspondence and tries to clarify his position, it is of no consequence and of no use. The intention of the defendant at the time of issuing notice Exhibit 'B' was very clear. He had no doubt that he is cheated by the plaintiff and he has in clear and unambiguous terms repeated his assertion that he has been so cheated and therefore he has no intention to proceed with the agreement. Nothing more was required for the plaintiff to enable him to get back the property and the business from the defendant. The suit was therefore rightly filed by the plaintiff for the reliefs claimed. The Court was therefore justified in decreeing the suit.

9. Mr. Dani contended that it was in fact a suit for possession and therefore the claim should have been valued as per the value of the property. But it is clear from the record that preliminary issue in this regard was framed by the court on the

basis of the objections raised by the defendant and the Court gave finding against the defendant. The defendant did not challenge that order. Therefore not framing of that issue again in the final judgment, give any cause to the defendant for agitating the judgment or make a grievance about the same. Since that issue was decided, though at an interlocutory stage, it achieved finality when order was passed against the defendant and which was not challenged by him. Therefore it is not necessary to consider that aspect again.

10. Mr. Dani also contended that the defendant was a licensee with possession and therefore the suit should have been filed before the Small Causes Court. In this regard, view of the court is that what is reflected in the document be taken as it is and nothing more can be added to the document i.e. the agreement between the parties. If the agreement does not use the word Licensor or Licensee anywhere and it clearly states as to what will be the relationship between the parties, then it is not permissible to label the agreement Exhibit 'A' as an agreement between licensor and licensee. The agreement is for conducting the business and therefore it has to be taken as agreement for conducting the business only. In fact this is a case where on facts the defendant has no defence.

He himself has terminated the agreement and therefore the Court was justified in passing decree as prayed. There are no merits in this appeal. It is dismissed with costs all throughout.

22.03.2005 (D.G. DESHPANDE, J.)